No. 77-944

In the Supreme Court of the United States

OCTOBER TERM, 1977

JON ALAN FREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The question presented in this federal excise tax case is whether the government may collect the marijuana transfer tax with respect to a taxable event that occurred before the statute (26 U.S.C. 4741) was repealed.

After his plea of guilty, petitioner was convicted of violating the laws of the United States regulating the transfer of marijuana and requiring the payment of a federal excise tax upon such transfers. The transfers of 208.96 ounces of marijuana in question occurred during April and May of 1969. On August 29, 1969, the Internal Revenue Service assessed $20,900 of federal excise taxes against petitioner for such transfers pursuant to 26 U.S.C. 4741(a)(2), which was then still in effect (Pet. App. B-3 to B-4).

After petitioner's claim for refund of partial payment of the assessment was denied, he instituted this refund suit in the United States District Court for the Northern District of Texas. The government counterclaimed for the unpaid balance of the assessment. The district court held that petitioner was not liable for the tax because the marijuana transfer tax provision had been repealed, effective May 1, 1971, by Section 1101(b)(3)(A) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1292 (Pet. App. B-11 to B-16).

The court of appeals unanimously reversed. After examining Congress' understanding of the purpose of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and the language of the general saving statute in 1 U.S.C. 109, it held that petitioner's liability for unpaid marijuana transfer taxes was not extinguished by the repeal of the statute (Pet. App. B-1 to B-10).

1. The court of appeals correctly held that petitioner's liability for the excise tax on his marijuana transfers occurring prior to May 1, 1971, was not extinguished by the repeal of the excise tax statute, effective on that date. As the court properly recognized, the question whether petitioner's 1969 liability for transfer taxes was abated by the 1971 repeal must be determined by reference to the general saving statute, 1 U.S.C. 109. *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452; *United States* v. *Brown*, 429 F. 2d 566 (C.A. 5). See also *Warden* v. *Marrero*, 417 U.S. 653, 660. That statute provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the repealing Act shall so expressly provide* * * *" (emphasis added).

Here there is nothing in the repealing act itself, its legislative history, or its special saving clause that establishes that Congress intended to extinguish tax

liabilities previously incurred under Section 4741 of the Code. The court of appeals correctly concluded that the general saving statute applies to preserve petitioner's pre-existing tax liability (Pet. App. B-2 to B-3).

Contrary to petitioner's argument (Pet. 5), the fact that Section 1103 of the Drug Control Act of 1970, 84 Stat. 1294, explicitly saved criminal prosecutions, civil seizures, forfeitures, and injunctive proceedings does not show that the repeal of 26 U.S.C. 4741 extinguished all civil tax liability. While the courts have frequently applied the maxim of statutory construction that the expression of one thing excludes others not expressed (*expressio unius est exclusio alterius*) (see, *e.g.*, *Townsend* v. *Little*, 109 U.S. 504; *Rybolt* v. *Jarrett*, 112 F. 2d 642 (C.A. 4)), the express mention of certain limited matters does not necessarily require the exclusion of others. *United States* v. *Carter*, 171 F. 2d 530 (C.A. 5). Moreover, where there is a contrary expression of congressional intent, the maxim has no application. *Alaska* v. *American Can Co.*, 358 U.S. 224; *Passenger Corp.* v. *Passengers Assn.*, 414 U.S. 453, 458. 2A Sutherland, *Statutes and Statutory Construction*, § 47.25 (1973).

Here, as the court of appeals recognized, Congress' preservation of criminal prosecutions for failure to pay the marijuana transfer tax shows that it intended to preserve the civil liability for the tax. To conclude otherwise would attribute to Congress the peculiar intention to continue criminal prosecutions for failure to pay a tax with respect to which it abolished (Pet. App. B-9).

2. Petitioner further contends (Pet. 6-9) that requiring him to pay the marijuana transfer tax would violate his

privilege against compulsory self-incrimination.[1] This Court has rejected similar claims with respect to the wagering excise tax. *Marchetti* v. *United States*, 390 U.S. 39, 44, 61; *Grosso* v. *United States*, 390 U.S. 62, 69-70 n. 7. See also *United States* v. *Sanchez*, 340 U.S. 42; *Simmons* v. *United States*, 476 F. 2d 715 (C.A. 10); *Vasilinda* v. *United States*, 487 F. 2d 24 (C.A. 5); *Cancino* v. *United States*, 451 F. 2d 1028 (Ct. Cl.), certiorari denied, 408 U.S. 925. There is nothing in the marijuana transfer tax that requires a different conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

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[1] *Leary* v. *United States*, 395 U.S. 6, *Minor* v. *United States*, 396 U.S. 87, and *Buie* v. *United States*, 396 U.S. 87, upon which petitioner relies (Pet. 6-8), are distinguishable. In those cases the privilege against self-incrimination was invoked in criminal proceedings; however, the fact that petitioner could claim the privilege with respect to his dealings in marijuana does not relieve him of the obligation to pay the transfer tax. See *Marchetti* v. *United States*, 390 U.S. 39, 44, 61; *Grosso* v. *United States*, 390 U.S. 62, 69-70 n. 7.

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